

**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR: 5939**

**DATE COMPLAINT FILED: September 14, 2007**

**DATE OF NOTIFICATION: September 20, 2007**

**LAST RESPONSE RECEIVED: November 9, 2007**

**DATE ACTIVATED: November 29, 2007**

**EXPIRATION OF SOL: September 10, 2012**

**COMPLAINANT:**

**David A. Keene, Chairman, American  
Conservative Union**

**RESPONDENTS:**

**The New York Times Company  
MoveOn.org Political Action and Wes Boyd, in his  
official capacity as treasurer**

**RELEVANT STATUTES  
AND REGULATIONS:**

**2 U.S.C. § 441b(a)  
2 U.S.C. § 431(8)(A)(i)  
11 C.F.R. § 100.52(d)**

**INTERNAL REPORTS CHECKED:**

**Disclosure Reports**

**FEDERAL AGENCIES CHECKED:**

**None**

**I. INTRODUCTION**

**This matter involves allegations that The New York Times Company ("The Times")  
made a corporate contribution in connection with the rate it charged for a full-page advertisement  
run by MoveOn.org Political Action ("MOPA"), a non-connected multicandidate committee.  
The complaint alleges that MOPA paid \$65,000 for its advertisement, far below The Times'  
typical charge of either \$167,000 or \$181,692 for full-page advertisements. The complaint**

1 concludes that this discount constitutes a corporate contribution from The Times to MOPA in  
2 violation of 2 U.S.C. § 441b.<sup>1</sup>

3 Based on available information discussed below, including information provided by  
4 Respondents, we recommend that the Commission find no reason to believe that Respondents  
5 violated the Federal Election Campaign Act of 1971, as amended, ("the Act") and close the file  
6 in this matter.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8 **A. Background**

9 On Friday, September 7, 2007, MOPA contacted The Times regarding running an  
10 advertisement on Monday, September 10. The Times agreed to run MOPA's advertisement on  
11 that date and the parties agreed to a price of \$64,575. On September 10, The Times published  
12 the advertisement, titled "General Petraeus Or General Betray Us? Cooking the books for the  
13 White House." Attachment 1. The advertisement contained a disclaimer, "Paid for by  
14 MoveOn.org Political Action, political.moveon.org, not authorized by any candidate or  
15 candidate's committee." MOPA's advertisement spawned public discussion of its content and  
16 criticism of The Times for allegedly reducing its normal advertising rate for MOPA. See Charles  
17 Hurt, *Times Gives Lefties a Hefty Discount for 'Betray Us' Ad*, NEW YORK POST, September 13,  
18 2007; Claudia Parsons, *MoveOn got timely break on ad rate*, WASHINGTON TIMES, September 14,  
19 2007 (attached to the MUR 5939 complaint as Exhibits C and D, respectively).

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<sup>1</sup> The complaint further alleges that the amount of this discount constitutes an excessive contribution from The Times to MOPA. Because corporate contributions are generally prohibited and therefore not subject to specific limitation, we address this matter as an alleged corporate contribution and not as an alleged excessive contribution. See 2 U.S.C. §§ 441b(a) and 441a(a).

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1       On September 14, 2007, the complaint regarding MOPA's advertisement was filed with  
2 the Commission. Later, on September 23, 2007, The Times published an article by Clark Hoyt,  
3 The Times' Public Editor,<sup>2</sup> in which he questioned the MOPA advertisement's content and stated  
4 that MOPA should not have been charged the "standby" rate of \$64,575. Clark Hoyt, *Betraying*  
5 *Its Own Best Interests*, THE NEW YORK TIMES, September 23, 2007. Attachment 2. Hoyt  
6 described this rate as available to advertisers who are not guaranteed what day their  
7 advertisement will appear, only that it will be in The Times within seven days. According to  
8 Hoyt, because The Times agreed to run MOPA's advertisement on a specific day, Monday,  
9 September 10, 2007, The Times should have charged MOPA a higher rate of \$142,083. Hoyt  
10 quoted Catherine Mathis, vice president of corporate communications for The Times, as  
11 acknowledging "[w]e made a mistake," in that The Times' advertising representative failed to  
12 make it clear to MOPA that for the \$64,575 rate, The Times could not guarantee the Monday,  
13 September 10 placement; the representative, however, left MOPA with the understanding that the  
14 advertisement would in fact run that day.<sup>3</sup> On the same day as the Hoyt article appeared in The  
15 Times, MOPA announced that it would pay \$142,083 for its advertisement, and the committee  
16 did so the following day, September 24, 2007.

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<sup>2</sup> Hoyt's article describes The Times' Public Editor as serving "as the readers' representative. His opinions and conclusions are his own."

<sup>3</sup> Previously, The Times had reportedly defended its arrangement with MOPA regarding the cost of the advertisement. See, e.g., Emily Cadel, *MoveOn Ad Flap Likely to Be Replicated – On Both Sides – Through 2008*, CQ POLITICS.COM, September 19, 2007.

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**B. Analysis**

The Act prohibits corporations such as The Times from making contributions in connection with Federal elections,<sup>4</sup> and prohibits political committees such as MOPA from knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a). The term "contribution" includes giving "anything of value" for the purpose of influencing any election for Federal office. 2 U.S.C. §§ 431(8)(A) and 441b(b)(2). The term "anything of value" includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1).

The provision of goods or services at less than the usual and normal charge for such goods or services is a contribution.<sup>5</sup> *Id.* The Commission's regulations include "advertising services" as an example of such goods and services. *Id.* If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee. *Id.* For the purposes of this provision, "usual and normal charge" for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2).

The issue of vendor discounts to political committees has been addressed by the Commission in a number of Advisory Opinions. In these AOs, the Commission has permitted a vendor to provide a discount to a political committee so long as the discount is made available in the ordinary course of business and on the same terms and conditions to other customers that are

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<sup>4</sup> The Times is a corporation organized under the laws of the State of New York.

<sup>5</sup> A number of exemptions to this rule are set forth in 11 CFR Part 100, Subpart C, none of which are applicable here.

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not political committees or organizations. *See, e.g.*, AOs 2006-1 (PAC for a Change); 1995-46 (D'Amato); 1994-10 (Franklin National Bank).

Accordingly, this matter turns on whether the price paid for the advertisement fell below The Times' usual and normal charge for that kind of advertisement. *See* 11 C.F.R. § 100.52(d). The available information indicates that the appropriate charge turns on the understanding between The Times and the committee regarding the placement of its advertisement. A large difference in price depends on whether the parties agreed that the advertisement would run on a certain date, an "open" arrangement, or whether the advertisement was not guaranteed to run on a particular day but would run at some point during the next week, a "standby" arrangement.

The Times denies making any corporate contribution to MOPA, and defends the original \$64,575 price for the advertisement initially agreed upon by The Times and MOPA as the result of a routine advertising sales transaction.<sup>6</sup> The Times resp. at 1, 2. In the wake of The Times' own public acknowledgment that the circumstances of MOPA's advertisement warranted the higher rate of \$142,083, MOPA paid the higher figure.<sup>7</sup> In light of MOPA's payment of this amount within two weeks of the date on which the advertisement ran, The Times argues that any possible violation, which The Times denies, has been remedied, and "this cure has made the matter moot." *Id.* at 3.

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<sup>6</sup> The Times argues that its advertising rates are based on a complex web of factors, including negotiation with the buyer; in fact, most newspaper advertising is priced beneath the higher "open rate" cited in the complaint. The Times resp. at 5 and 8. Indeed, The Times provided copies of e-mail messages involving a MOPA representative and various Times' advertising department employees that purportedly show the negotiation regarding MOPA's advertisement. *Id.* at Exh. A.

<sup>7</sup> The Times defends this rate as well, which it explains by starting at the applicable \$181,692 open rate cited in the complaint, then subtracting 8% for the standard full-page discount, and subtracting another 15% for the advertising agency commission, leaving an applicable rate of \$142,083. The Times resp. at 9.

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1 MOPA in its response similarly denies that any corporate contribution was made and  
2 received in connection with its advertisement in The Times.<sup>8</sup> MOPA argues that even if the  
3 Commission had jurisdiction over the payment for the advertisement, the committee did not  
4 receive an improper corporate contribution because it paid \$142,083, the reported usual and  
5 normal rate within The Times' usual and normal billing cycle. MOPA resp. at 1, 6-8. Moreover,  
6 MOPA continues, even if the original quoted rate of \$64,575 was less than The Times' usual and  
7 normal rate, in order to avoid any questions or the appearance of impropriety, MOPA promptly  
8 paid the full price as soon as it discovered that there was a question whether the original quoted  
9 rate may have been erroneous. *Id.* at 1, 8.

10 The available information suggests that the \$64,575 rate initially agreed upon by MOPA  
11 and The Times was less than the usual and normal price of \$142,083 for an advertisement  
12 guaranteed to run on a particular day.<sup>9</sup> The difference between these two figures, \$77,508, would  
13 have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the  
14 higher rate of \$142,083 on September 24, 2007.<sup>10</sup> See 2 U.S.C. § 441b(a); 11 C.F.R.  
15 § 100.52(d). Thus, MOPA appears to have paid the usual and normal rate for its advertisement.  
16 See 11 C.F.R. § 100.52(d).

<sup>8</sup> Notwithstanding its political committee status, MOPA initially argues that even if it paid less than The Times' usual and normal rate for advertisements of this nature, a contribution did not take place, because MOPA's advertisement was not "for the purpose of influencing any election for Federal office," see 2 U.S.C. § 431(8)(A), nor was it "in connection with any election," see 2 U.S.C. § 441b(b)(2). MOPA resp. at 1, 4-6.

<sup>9</sup> The Times' website confirms the 8% full-page discount and 15% advertising agency commission discount that The Times references in its response, resulting in the \$142,083 open rate for a full-page advertisement. See <http://www.nytimes.whites.net/mediakit>.

<sup>10</sup> MOPA disclosed a payment of \$165,717.56 on that date to Zimmerman & Markman, Inc. for a "Newspaper [sic] Ad" on its 2007 Year End Report. Counsel for MOPA has confirmed to us that Zimmerman & Markman is a media vendor for MOPA and that this amount covers the \$142,083 rate for MOPA's advertisement in The Times plus production costs and markup.

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1        Indeed, MOPA's payment, approximately two weeks after the advertisement ran, also  
2        appears to be timely. MOPA asserts that because the negotiations with The Times were made  
3        through its media vendor, Fenton Communications ("Fenton"), an established customer of The  
4        Times, no advance payment was required for the advertisement.<sup>11</sup> MOPA resp. at 7. Fenton is  
5        normally invoiced by The Times on a monthly basis, with payment due 15 days thereafter;  
6        Fenton bills the advertiser and then pays The Times. *Id.* at Exh. 2, Trevor Fitzgibbon  
7        Declaration at ¶ 5.<sup>12</sup>

8        It thus appears that The Times extended credit to MOPA in the ordinary course of  
9        business and, notwithstanding the initial confusion as to the pricing, MOPA paid for its  
10       advertisement in a timely manner.<sup>13</sup> See 11 C.F.R. §§ 100.55 (the extension of credit by any  
11       person is a contribution unless the credit is extended in the ordinary course) and 116.3(b) (a

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<sup>11</sup> The Times' website page regarding "Credit and Payment Terms" states in part:

Advertisements must be paid for prior to publication deadline unless credit has been established by the advertiser and/or agency with The Times.

...

Advertisers and agencies granted credit will be billed weekly or monthly for published advertisements, as is determined by the category of advertising and established credit terms. Payment is due 15 days after the invoice date.

<http://www.nytimes.whites.net/mediakit>.

<sup>12</sup> On this occasion, however, MOPA requested an invoice from The Times in advance of Fenton's usual payment process. The Times provided an invoice for \$64,575, and MOPA proceeded to request a second invoice, for \$142,083, which The Times also provided. MOPA resp. at 7 and Exh. 4. MOPA paid The Times \$142,083 on September 24, 2007.

<sup>13</sup> Even if The Times were considered to have extended credit to MOPA outside the ordinary course of business, and thus made a corporate contribution to MOPA, the committee's payment on September 24, 2007, two weeks after the advertisement, would appear to fall within the 30-day safe harbors set forth in the Commission's regulations, at least by analogy. See 11 C.F.R. § 103.3(b)(1) (contributions that present genuine questions as to whether they were made by corporations, may be, within ten days of receipt, either deposited or returned to the contributor; if deposited, the treasurer shall make his or her best efforts to determine the legality of the contribution; if the contribution cannot be determined to be legal, the treasurer shall refund the contribution within 30 days of receipt); and (2) (if a contribution appeared to be permissible at the time of receipt but the treasurer later discovers that it is illegal based on information not available to the political committee at the time of receipt, the treasurer shall refund the contribution to the contributor within 30 days of the date on which the illegality is discovered).

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1 corporation in its capacity as a commercial vendor may extend credit to a political committee  
2 provided that the credit is extended in the ordinary course of business and on terms substantially  
3 similar to nonpolitical debtors that are of similar risk and size of obligation). In sum, based on  
4 the available information, we recommend that the Commission find no reason to believe that  
5 The New York Times Company or MoveOn.org Political Action and Wes Boyd, in his official  
6 capacity as treasurer, violated 2 U.S.C. § 441b(a), and close the file in this matter.<sup>14</sup>

7 **III. RECOMMENDATIONS**

- 8 1. Find no reason to believe that The New York Times Company violated 2 U.S.C.  
9 § 441b(a).  
10  
11 2. Find no reason to believe that MoveOn.org Political Action and Wes Boyd, in his  
12 official capacity as treasurer, violated 2 U.S.C. § 441b(a).  
13  
14 3. Approve the attached Factual and Legal Analyses.  
15  
16 4. Close the file.  
17  
18 5. Approve the appropriate letters.  
19  
20

21 Thomasenia P. Duncan  
22 General Counsel

23  
24 3-23-09  
25 Date

26 BY:

27 Kathleen M. Guith  
28 Kathleen M. Guith  
29 Deputy Associate General Counsel  
30 for Enforcement

31 Mark Allen  
32 Mark Allen  
33 Assistant General Counsel

<sup>14</sup> Because the available information indicates that MOPA paid the usual and normal price for its advertisement in the usual and normal timeframe, we need not reach MOPA's novel argument that would permit a political committee to receive in-kind corporate contributions in connection with communications that were arguably not "for the purpose of influencing any election for Federal office." See 2 U.S.C. § 431(8)(A).

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- 2 **Attachments:**
- 3     **1. MoveOn.org Political Action advertisement**
- 4     **2. Clark Hoyt, *Betraying Its Own Best Interests*, THE NEW YORK TIMES, September 23, 2007**
- 5     |
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# GENERAL PETRAEUS OR GENERAL BETRAY US?

## Cooking the Books for the White House

General Petraeus is a military man constantly at war with the facts. In 2004, just before the election, he said there was "tangible progress" in Iraq and that "Iraqi leaders are stepping forward." And last week Petraeus, the architect of the escalation of troops in Iraq, said, "We say we have achieved progress, and we are obviously going to do everything we can to build on that progress."

Every independent report on the ground situation in Iraq shows that the surge strategy has failed. Yet the General claims a reduction in violence. That's because, according to the *New York Times*, the Pentagon has adopted a bizarre formula for keeping tabs on violence. For example, deaths by car bombs don't count. The *Washington Post* reported that assassinations only count if you're shot in the back of the head -- not the front. According to the *Associated Press*, there have been more civilian deaths and more American soldier deaths in the past three months than in any other summer we've been there. We'll hear of neighborhoods where violence has decreased. But we won't hear that those neighborhoods have been ethnically cleansed.

Most importantly, General Petraeus will not admit what everyone knows: Iraq is mired in an unresolvable religious civil war. We may hear of a plan to withdraw a few thousand American troops. But we won't hear what Americans are desperate to hear: a timetable for withdrawing all our troops. General Petraeus has actually said American troops will need to stay in Iraq for as long as ten years.

Today, before Congress and before the American people, General Petraeus is likely to become General Deceit U.S.

**MoveOn.ORG**  
POLITICAL ACTION

Fund for by MoveOn.org Political Action, political.moveon.org, not influenced by any candidate or candidate's committee.

September 23, 2007

## **THE PUBLIC EDITOR; Betraying Its Own Best Interests**

By **CLARK HOYT**

**FOR** nearly two weeks, The New York Times has been defending a political advertisement that critics say was an unfair shot at the American commander in Iraq.

But I think the ad violated The Times's own written standards, and the paper now says that the advertiser got a price break it was not entitled to.

On Monday, Sept. 10, the day that Gen. David H. Petraeus came before Congress to warn against a rapid withdrawal of troops, The Times carried a full-page ad attacking his truthfulness.

Under the provocative headline "General Petraeus or General Betray Us?" the ad, purchased by the liberal activist group MoveOn.org, charged that the highly decorated Petraeus was "constantly at war with the facts" in giving upbeat assessments of progress and refusing to acknowledge that Iraq is "mired in an unwinnable religious civil war."

"Today, before Congress and before the American people, General Petraeus is likely to become General Betray Us," MoveOn.org declared.

The ad infuriated conservatives, dismayed many Democrats and ignited charges that the liberal Times aided its friends at MoveOn.org with a steep discount in the price paid to publish its message, which might amount to an illegal contribution to a political action committee. In more than 4,000 e-mail messages, people around the country raged at The Times with words like "despicable," "disgrace" and "treason."

President George W. Bush called the ad "disgusting." The Senate, controlled by Democrats, voted overwhelmingly to condemn the ad.

Vice President Dick Cheney said the charges in the ad, "provided at subsidized rates in The New York Times" were "an outrage." Thomas Davis III, a Republican congressman from Virginia, demanded a House investigation. The American Conservative Union filed a formal complaint with the Federal Election Commission against MoveOn.org and The New York Times Company. FreedomsWatch.org, a group recently formed to support the war, asked me to investigate because it said it wasn't offered the same terms for a response ad that MoveOn.org got.

Did MoveOn.org get favored treatment from The Times? And was the ad outside the bounds of acceptable political discourse?

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The answer to the first question is that MoveOn.org paid what is known in the newspaper industry as a standby rate of \$64,575 that it should not have received under Times policies. The group should have paid \$142,083. The Times had maintained for a week that the standby rate was appropriate, but a company spokeswoman told me late Thursday afternoon that an advertising sales representative made a mistake.

The answer to the second question is that the ad appears to fly in the face of an internal advertising acceptability manual that says, "We do not accept opinion advertisements that are attacks of a personal nature." Steph Jespersen, the executive who approved the ad, said that, while it was "rough," he regarded it as a comment on a public official's management of his office and therefore acceptable speech for The Times to print.

By the end of last week the ad appeared to have backfired on both MoveOn.org and fellow opponents of the war in Iraq — and on The Times. It gave the Bush administration and its allies an opportunity to change the subject from questions about an unpopular war to defense of a respected general with nine rows of ribbons on his chest, including a Bronze Star with a V for valor. And it gave fresh ammunition to a cottage industry that loves to bash The Times as a bastion of the "liberal media."

How did this happen?

Eli Pariser, the executive director of MoveOn.org, told me that his group called The Times on the Friday before Petraeus's appearance on Capitol Hill and asked for a rush ad in Monday's paper. He said The Times called back and "told us there was room Monday, and it would cost \$65,000." Pariser said there was no discussion about a standby rate. "We paid this rate before, so we recognized it," he said. Advertisers who get standby rates aren't guaranteed what day their ad will appear, only that it will be in the paper within seven days.

Catherine Mathis, vice president of corporate communications for The Times, said, "We made a mistake." She said the advertising representative failed to make it clear that for that rate The Times could not guarantee the Monday placement but left MoveOn.org with the understanding that the ad would run then. She added, "That was contrary to our policies."

Arthur Sulzberger Jr., the publisher of The Times and chairman of its parent company, declined to name the salesperson or to say whether disciplinary action would be taken.

Jespersen, director of advertising acceptability, reviewed the ad and approved it. He said the question mark after the headline figured in his decision.

The Times bends over backward to accommodate advocacy ads, including ads from groups with which the newspaper disagrees editorially. Jespersen has rejected an ad from the National Right to Life Committee, not, he said, because of its message but because it pictured aborted fetuses. He also rejected an ad from MoveOn.org that contained a doctored photograph of Cheney. The photo was replaced, and the ad ran.

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Sulzberger, who said he wasn't aware of MoveOn.org's latest ad until it appeared in the paper, said: "If we're going to err, it's better to err on the side of more political dialogue. ... Perhaps we did err in this case. If we did, we erred with the intent of giving greater voice to people."

For me, two values collided here: the right of free speech -- even if it's abusive speech -- and a strong personal revulsion toward the name-calling and personal attacks that now pass for political dialogue, obscuring rather than illuminating important policy issues. For The Times, there is another value: the protection of its brand as a newspaper that sets a high standard for civility. Were I in Jespersen's shoes, I'd have demanded changes to eliminate "Betray Us," a particularly low blow when aimed at a soldier.

In the fallout from the ad, Rudolph Giuliani, the former New York mayor and a Republican presidential candidate, demanded space in the following Friday's Times to answer MoveOn.org. He got it -- and at the same \$64,575 rate that MoveOn.org paid.

Bradley A. Blakeman, former deputy assistant to President Bush for appointments and scheduling and the head of FreedomWatch.org, said his group wanted to run its own reply ad last Monday and was quoted the \$64,575 rate on a standby basis. The ad wasn't placed, he said, because the newspaper wouldn't guarantee him the day or a position in the first section. Sulzberger said all advocacy ads normally run in the first section.

Mathis said that since the controversy began, the newspaper's advertising staff has been told it must adhere consistently to its pricing policies.